(2) (2)

Nos. 92-115 and 92-177

FILED
OCT 15 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

EUGENE ALBERT FISCHER, PETITIONER

v.

UNITED STATES OF AMERICA

BENJAMIN BARRY KRAMER AND
RANDY THOMAS LANIER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether petitioners' life sentences, under 21 U.S.C. 848(b), for being principal administrators, organizers, or leaders of a continuing criminal enterprise violated the Ex Post Facto Clause of the Constitution.

2. Whether the jury must be instructed that it must unanimously agree on which drug offenses comprised the "series of violations" element of a CCE offense (No. 92-115).

3. Whether the district court properly denied petitioner's motion for leave to depose foreign witnesses (No. 92-115).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Collins v. *Youngblood*, 110 S. Ct. 2715 (1990)	8
Griffin v. *United States*, 112 S. Ct. 466 (1991)	14
McKoy v. *North Carolina*, 494 U.S. 433 (1990)	14
Miller v. *Florida*, 482 U.S. 423 (1987)	13
Platt v. *Minnesota Mining. & Mfg. Co.*, 376 U.S. 240 (1964)	13
Schad v. *Arizona*, 111 S. Ct. 2491 (1991)	14, 15
United States v. *Baker*, 905 F.2d 1100 (7th Cir.), cert. denied, 111 S. Ct. 206 (1990)	14
United States v. *Baresh*, 790 F.2d 392 (5th Cir. 1986)	8
United States v. *Bello*, 532 F.2d 422 (5th Cir. 1976)	17
United States v. *Beros*, 833 F.2d 455 (3d Cir. 1987)	15
United States v. *Campanale*, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976)	8
United States v. *Canino*, 949 F.2d 928 (7th Cir. 1991), cert. denied, 112 S. Ct. 1940 (1992)	7, 16
United States v. *Echeverri*, 854 F.2d 638 (3d Cir. 1988)	15, 16
United States v. *Ferrara*, 458 F.2d 868 (2d Cir.), cert. denied, 408 U.S. 931 (1972)	8
United States v. *Gipson*, 553 F.2d 453 (5th Cir. 1977)	15
United States v. *Giry*, 818 F.2d 120 (1st Cir. 1987), cert. denied, 484 U.S. 855 (1987)	8
United States v. *Hall*, 843 F.2d 408 (10th Cir. 1988)	14
United States v. *Hicks*, 945 F.2d 107 (5th Cir. 1991)	12

Cases—Continued: Page

United States v. *Ismaili*, 828 F.2d 153 (3d Cir. 1987), cert. denied, 485 U.S. 935 (1988) 16-17, 18
United States v. *Jackson*, 879 F.2d 85 (3d Cir. 1989) 16
United States v. *Jerome*, 942 F.2d 1328 (9th Cir. 1991) . 16
United States v. *Johnpoll*, 739 F.2d 702 (2d Cir.), cert. denied, 469 U.S. 1075 (1984) 17
United States v. *Johnson*, 537 F.2d 11470 (4th Cir. 1976) 8
United States v. *Mann*, 590 F.2d 361 (1st Cir. 1978) 16
United States v. *Ordonez*, 737 F.2d 793 (9th Cir. 1984). 14
United States v. *Sindona*, 636 F.2d 792 (2d Cir. 1980), cert. denied, 451 U.S. 912 (1981) 18
United States v. *Torres*, 901 F.2d 205 (2d Cir. 1990) 12
Weaver v. *Graham*, 450 U.S. 24 (1981) 8

Constitution, statutes and rule:

U.S. Const. Art. I, § 9, Cl. 3 (Ex Post Facto Clause) 6, 7, 8, 12, 13
18 U.S.C. 371 2
18 U.S.C. 3237(a) 13
21 U.S.C. 846 2
21 U.S.C. 848 ..... 2, 13
21 U.S.C. 848(a) 7, 8
21 U.S.C. 848(b) 5, 6, 7, 8, 9, 10, 12
21 U.S.C. 848(c) 7, 13
21 U.S.C. 848(d) 7
Fed. R. Crim. P. 15(a) 16

Miscellaneous:

2 Charles Alan Wright, *Federal Practice and Procedure (Criminal 2d)* (1982) 17

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-115

EUGENE ALBERT FISCHER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 92-177

BENJAMIN BARRY KRAMER AND
RANDY THOMAS LANIER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App 1a-59a)[1] is reported at 955 F.2d 479.

---

[1] "Pet. App." refers to the Appendix filed in No. 92-177, except where indicated otherwise.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1992. A petition for rehearing was denied on April 14, 1992. The petitions for a writ of certiorari were filed on July 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Illinois, petitioners were convicted of conspiring to distribute marijuana, in violation of 21 U.S.C. 846, and engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. Pet. App. 2a. Petitioner Lanier was also convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371. Petitioners were sentenced to life imprisonment without possibility of parole on the CCE count. Petitioners Lanier and Kramer were also sentenced to 40 years' imprisonment on the Section 846 conspiracy count, and petitioner Fischer was sentenced to 35 years' imprisonment on the Section 846 conspiracy count, with those sentences to run concurrently with the CCE sentences. In addition, petitioner Lanier was sentenced to 5 years' imprisonment on the Section 371 conspiracy count, with that sentence to run consecutively to his sentence for the Section 846 conspiracy. Petitioners Lanier and Kramer were ordered to forfeit $60,000,000, while petitioner Fischer was ordered to forfeit $30,000,000. Pet. App. 3a. The court of appeals affirmed. *Id.* at 1a-59a.

1. The evidence showed that petitioners ran a marijuana smuggling operation from which they reaped tens of millions of dollars in profits in the early to mid-1980's. In 1982, Lanier and Kramer arranged for two boatloads of marijuana to be imported from Colombia to Melbourne Beach, Florida. Fischer assisted Lanier and Kramer in organizing and carrying out the next five transactions.

In the spring of 1983, they imported 30,000 pounds of marijuana into Bridgeport, Connecticut, and arranged its distribution. In the fall of 1983, they transported a barge containing approximately 14,000 pounds of marijuana to New York. Pet. App. 4a-6a. Marijuana from each of those loads was transported to Southern Illinois for distribution. Gov't C.A. Br. 5-6, 8.

In the next transaction, which took place in 1984, Lanier, Kramer, and Fischer imported a bargeload of 147,000 pounds of marijuana into San Francisco. Customers of Lanier and Kramer delivered some of that marijuana to Millstadt, Illinois. The sale of the marijuana brought in more than $50 million. In the spring of 1985, the enterprise smuggled a bargeload of approximately 152,000 pounds of marijuana into New Orleans, some of which was shipped to Millstadt. Kramer purchased the marijuana in Colombia, Fischer rented the dock space and arranged to bring the barge to dock, and Lanier directed its unloading. Pet. App. 6a-7a.

In the final transaction, which took place in November 1986, petitioners' enterprise imported approximately 130,000 pounds of marijuana into San Francisco. Kramer arranged for the purchase and, with Lanier, the distribution of the marijuana, while Fischer provided the workers who removed the marijuana from the barge and loaded it onto trailers. The enterprise collected $34,795,000 for that load. Kramer received $12,500,000; Fischer split $10,253,000 with another principal in the enterprise, George Brock; and Lanier received the balance. Pet. App. 8a-9a.

2. Prior to trial, Fischer asked the district court for leave to take the depositions of ten foreign witnesses—two in Venezuela, six in the Dominican Republic, one in Great Britain, and one in the Netherlands. Fischer stated in his motion that those witnesses, two of whom were unindicted co-conspirators, would refute govern-

ment allegations that Fischer owned certain vessels and entities connected with vessels involved in the marijuana smuggling operation. Fischer also stated that the witnesses were unwilling to travel to the United States to testify. May 24, 1988, Mem. and Order at 1-2.

The district court denied the motion, stating that Fischer had "not sustained his burden of proving that extraordinary circumstances exist justifying foreign depositions." May 24, 1988, Mem. and Order at 2-3. The court explained that Fischer had offered only conclusory statements concerning the unavailability of the witnesses. He had failed to specify sufficiently what testimony the witnesses would give, to provide an explanation of the witnesses' knowledge of the matters about which they would testify, to demonstrate that the testimony would not be cumulative of other evidence, and to establish the materiality of the testimony. *Id.* at 2-4. On the matter of materiality, the court stated that Fischer's "legitimate connections with the[] vessels or entities would not necessarily dispel their concurrent illegal use." *Id.* at 3.

3. The continuing criminal enterprise (CCE) statute provides for a mandatory life sentence for a person engaging in a CCE offense if

> (1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and (2)(A) the violation [referred to in the provision defining "continuing criminal enterprise"] involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or (B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufac-

> ture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

21 U.S.C. 848(b).

At trial, the district court submitted to the jury the question whether petitioners were liable under Section 848(b). The court instructed the jury that, in order to conclude that a defendant was a principal administrator, organizer, or leader of a continuing criminal enterprise within the meaning of the statute, it would have to find both of the following:

> First, that a defendant was the principal administrator, organizer, or leader of the continuing criminal enterprise or was one of several such principal administrators, organizers, or leaders of a continuing criminal enterprise that continued after the effective date of the statute, October 27, 1986:
>
> Second, that after October 27, 1986, a defendant committed a violation of importing marijuana, distributing marijuana or conspiracy to distribute marijuana as charged which involved at least 30,000 kilograms * * * of marijuana or that the enterprise in which a defendant was a principal * * * received $10 million in gross receipts between October 27, 1986, and including February 1987, for the importation or distribution of marijuana.

Pet. App. 12a-13a.

As to venue, the court instructed the jury that it could convict a defendant only if it found that the defendant committed at least one of the predicate drug offenses in the Southern District of Illinois. It did not require the jury to find that a predicate offense occurred in that district after the effective date of Section 848(b). Gov't C.A. Br. 43.

4. On appeal, petitioners contended that Section 848(b) is a separate substantive offense rather than a sentence enhancement provision. Therefore, they claimed, their CCE convictions violated the Ex Post Facto Clause of the United States Constitution because the instructions did not require the jury to find that they engaged in the predicate drug offenses after October 27, 1986. The court of appeals did not reach the validity of petitioners' premise that Section 848(b) creates a substantive offense, although it expressed the view that it does not. Pet. App. 15a. The court held, however, that even if that premise were correct there would be no ex post facto violation. *Id.* at 16a. The court explained that the Ex Post Facto Clause does not prohibit prosecution for offenses that began before the effective date of the statute and continued thereafter. *Id.* at 17a. The court then observed that in its view the district court's instruction properly required the jury to find that petitioners were principal administrators, organizers, or leaders of a continuing criminal enterprise until after the effective date of Section 848(b), and that the evidence showed that petitioners continued to participate in the enterprise after that date. Pet. App. 19a.

Petitioners further argued that venue for the CCE charge did not lie in the Southern District of Illinois because none of the predicate acts occurred in that district after the effective date of Section 848(b). The court held that, because the CCE offense continued after the effective date of Section 848(b), venue could be established by proof that an act in furtherance of the offense took place in the Southern District of Illinois before the statute's effective date. Pet. App. 22a. The court then concluded that the evidence was sufficient to establish proper venue. *Id.* at 23a.

The court of appeals also found no merit in Fischer's claim that the district court should have instructed the

jury that it must agree unanimously as to each of the predicate offenses constituting the "continuing series" element of the CCE offense. The court relied, Pet. App. 25a-26a, on its earlier decision in *United States* v. *Canino*, 949 F.2d 928 (7th Cir. 1991), cert. denied, 112 S. Ct. 1940 (1992), which held that "[t]he constitutional requirement of juror unanimity in federal criminal offenses is satisfied when each juror in a CCE trial is convinced beyond a reasonable doubt that a defendant charged under the CCE statute committed two predicate offenses." 949 F.2d at 948.

Finally, the court rejected without discussion petitioner Fischer's claim that the district court improperly refused to allow him to obtain the depositions of the foreign witnesses. Pet. App. 53a.

ARGUMENT

1. Petitioners contend (91-115 Pet. 10-37; 92-177 Pet. 12-43) that the application of Section 848(b) in this case violated the Ex Post Facto Clause because the jury was not required to find that petitioners acted as principal administrators, organizers, or leaders of the enterprise after October 27, 1986, the effective date of Section 848(b), or that they committed at least one of the predicate drug offenses in the Southern District of Illinois, the jurisdiction in which venue was laid, after that date.[2]

---

[2] We do not believe it was necessary for the district court to submit the question of the applicability of Section 848(b) to the jury because, in our view, the statute, rather than creating a new substantive offense, is a sentencing provision providing for enhanced punishment for certain violations of Section 848(a). This is suggested, among other factors, by the title of the statute—"Conditions for Life Imprisonment for Engaging in Continuing Criminal Enterprise"; by the fact that the statute contains an explicit reference to the necessary conviction under the predicate provision, Section 848(d) (now codified at subsection (c)); and by the fact that the statute limits the district court's discretion in sen-

The Ex Post Facto Clause prohibits Congress from "punish[ing] as a crime an act previously committed, which was innocent when done" or "mak[ing] more burdensome the punishment for a crime, after its commission." *Collins* v. *Youngblood*, 110 S. Ct. 2715, 2724 (1990). The purpose of the prohibition is "to assure that legislative acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981).

Petitioners' enhanced sentences under Section 848(b) did not violate the Ex Post Facto Clause. As the court of appeals observed, Pet. App. 17a, it is well settled that the ex post facto prohibition is not violated when an offense, though begun before the effective date of the pertinent statute, continues thereafter. See *United States* v. *Giry*, 818 F.2d 120, 135 (1st Cir.), cert. denied, 484 U.S. 855 (1987); *United States* v. *Baresh*, 790 F.2d 392, 404 (5th Cir. 1986); *United States* v. *Campanale*, 518 F.2d 352, 365 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); *United States* v. *Ferrara*, 458 F.2d 868, 874 (2d Cir.), cert. denied, 408 U.S. 931 (1972). There can be no question that the CCE statute, which makes it a crime to engage in a "continuing criminal enterprise," defines a continuing offense. See *United States* v. *Johnson*, 537 F.2d 1170 (4th Cir. 1976). Accordingly, subjecting a defendant to the penalty prescribed in Section 848(b) would violate the Ex Post Facto Clause only if the defendant's criminal conduct terminated before October 27, 1986, the effective date of Section 848(b). Cf. *Campanale*, 518 F.2d at 365

---

tencing within the range set forth in Section 848(a). Petitioners do not challenge the district court's submission of the sentence enhancement determination to the jury; on the contrary, they take the position that Section 848(b) is a substantive provision and therefore that that action was proper. 91-115 Pet. 10-19; see 92-177 Pet. 34 n.10.

(RICO statute applies where racketeering continued after RICO's effective date).

In this case, the district court instructed the jury that it could find Section 848(b) applicable to a defendant only if it made two findings: (1) that the defendant "was [a] principal administrator * * * of a continuing criminal enterprise that continued after the effective date of the [provision]," and (2) either that the defendant "committed a [drug offense] involv[ing] at least 30,000 kilograms * * * of marijuana" after the effective date of the provision or "the enterprise in which a defendant was a principal * * * administrator[] * * * received $10 million in gross receipts * * * for the importation or distribution of marijuana" after the effective date of the statute. Pet. App. 12a-13a. As the court of appeals concluded, those instructions adequately informed the jury that they could not apply Section 848(b) if they concluded that petitioners "stopped acting as principal administrators after § 848(b) became effective." Pet. App. 21a.

Although the instruction as given plainly can be read to require the jury to find that petitioners continued as principal administrators of the enterprise after the effective date of the statute, petitioners now in essence object that the instruction as given was ambiguous. In petitioners' view, the instruction can also be read to permit the jury to convict petitioners based on a finding that the enterprise continued after October 27, 1986, but that petitioners themselves neither continued to act as principal administrators after that date nor committed any other predicate act after that date. Petitioners never objected to the instructions, however, on the ground that they were ambiguous in this regard. Nor could any such ambiguity have affected the jury's deliberations, in light of the facts of the case and the way the case was argued to the jury.

In the district court, petitioners repeatedly objected to the indictment and the instructions on the ground that *all* elements of the Section 848(b) crime had to be satisfied after October 27, 1986. They moved for judgments of acquittal after the close of the government's case on that basis, see Tr. 8614-8615, 8623-8624; they submitted their own proposed instructions embodying that theory, see, *e.g.*, 92-177 Pet. App. 79a-81a; and they objected to the government's proposed instruction, which was adopted in relevant part by the court, on the basis of that theory as well, see Tr. 9996, 10,003, 10,486. They never asserted, however, that the instruction permitted the jury to convict them even if the jury found that they ceased acting as principal administrators, organizers, or leaders of the enterprise prior to the effective date of the statute. As we explained in our brief below, petitioners' failure to object on that ground indicates that they themselves understood the instruction as did the court of appeals and in any event that they waived any such objection they might have had. See Gov't C.A. Br. 49.

Moreover, in light of the arguments presented by both the prosecutor and defense counsel, it is highly unlikely that the jury interpreted the instruction as petitioners now allege. In their arguments to the jury, both the government and defense counsel conveyed their understanding that the jury instructions required the jury to find that the defendants were principal administrators, organizers, or leaders after the effective date of the statute. See Gov't C.A. Br. 48-49. The prosecutor informed the jury in closing argument that it "must find that the organization, or the enterprise, first of all, that he was a principal administrator after the effective date of the statute which is October 27, 1986." Tr. 10,115. Kramer's counsel told the jury in closing argument that "[y]ou will be instructed that you are to measure specific activities of Ben Kramer subsequent to October 27th, 1986,

when you are considering his culpability under Section 848(b) of Title 21."[3] Tr. 10,230. Fischer's counsel in discussing the "principal administrator, organizer or leader" requirement similarly referred to the "new law that went into effect in 1986, October 27, 1986." Tr. 10,275. In addition, during the prosecutor's rebuttal argument, there was a further colloquy between the prosecutor, Kramer's counsel, and the court in the presence of the jury, in which it was made clear that all parties shared the understanding that the "principal administrator" requirement had to be satisfied after October 27, 1986.[4]

Finally, the evidence was overwhelming that in November 1986, after the effective date of the statute, petitioners imported tons of marijuana into San Francisco and received millions of dollars in proceeds from that shipment. Even petitioner Kramer, who was not in San Francisco when the marijuana was unloaded there, received $12 million from the proceeds of the shipment. In light of the statements of various counsel themselves and the evidence in this case, the instructions adequately informed the jury that it had to find that the de-

---

[3] Since the government did not allege that Kramer was on the scene during the unloading of the November 1986 shipment in San Francisco, his counsel was in the best position to take advantage of the requirement that the crime had to be shown to have continued past October 27, 1986.

[4] The prosecutor stated that "[w]ith respect to being a principal administrator, you have to determine whether or not the activity of the enterprise continued past October 27, 1987 * * * whether these individuals committed acts after October 27, 1987." Tr. 10,379. Kramer's counsel noted that the appropriate year was 1986. *Ibid.* The prosecutor corrected himself, noting that the correct date was October 27, 1986, and added that "[t]he issue is whether or not the defendants were involved after that period of time and committed one of those acts. For instance, importation." *Ibid.*

fendants acted as principal administrators, organizers, or leaders of the enterprise after October 27, 1986.

Petitioners' reliance on *United States* v. *Torres*, 901 F.2d 205 (2d Cir. 1990), is misplaced. In that case, the jury was permitted to convict the defendants of violating Section 848(b) based on a finding that the elements of the statute were satisfied during a one-year period that straddled the effective date of the statute. 901 F.2d at 226. Because of the possibility that the jury relied exclusively on the defendants' role in the enterprise before the effective date of the statute, the court remanded the case for resentencing. In this case, by contrast, the jury instructions did not authorize the application of Section 848(b) if the jury found that petitioners were no longer principal administrators, organizers, or leaders after the statute became effective.[5]

Nor was the Ex Post Facto Clause violated by the district court's failure to instruct the jury that, in order to convict, it had to find that petitioners committed a predicate act in the Southern District of Illinois after the effective date of Section 848(b). For a continuing offense

---

[5] Petitioner Fischer argues (92-115 Pet. 30) that conspiracy does not qualify as a predicate offense for purposes of CCE and that the jury instructions impermissibly permitted the jury to apply Section 848(b) even if it found that the violation of the drug laws they committed after the effective date of the statute was the crime of conspiracy. On appeal, the court of appeals agreed with petitioners that conspiracy may not be counted as a predicate act, but the court held that the error in the instructions was harmless because petitioners were also charged with a number of substantive predicate offenses, including the post-October 27, 1986, San Francisco importation, that were "more than adequate" to meet the "series" element. Pet. App. 24a. No other court of appeals that has addressed the issue would have reached a different result, since each of those courts has held that conspiracy *may* qualify as a predicate act. See *United States* v. *Hicks*, 945 F.2d 107, 108 (5th Cir. 1991) (citing cases).

such as CCE, venue is proper in any district in which the offense "was begun, continued, or completed." See 18 U.S.C. 3237(a). We know of no authority—and petitioners cite none—for the proposition that, under the Ex Post Facto Clause, the act on which venue is based must occur after the effective date of the charging statute, where the crime commenced before that date. Such a requirement would have no relation to the purpose of the Ex Post Facto prohibition, which is to ensure that individuals have notice of what conduct is deemed criminal and how it will be punished. See *Miller* v. *Florida*, 482 U.S. 423, 433 (1987). Nor would it have any relation to the purpose of the constitutional or statutory venue provisions, which are safeguards "against the unfairness and hardship involved when an accused is prosecuted in a remote place." *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245 (1964). Accordingly, further review to consider whether the court of appeals should have adopted petitioners' novel venue argument is unwarranted.

2. Petitioner Fischer contends (92-115 Pet. 38-46) that the district court should have instructed the jurors that they must unanimously agree on which particular violations of law constituted the "series of violations" required to establish a CCE offense.

The CCE statute imposes criminal penalties for engaging in a "continuing criminal enterprise." 21 U.S.C. 848. It further states that a person is engaged in a continuing criminal enterprise if (1) he violates a provision of subchapter I or II of chapter 13 of Title 21 (dealing with control, enforcement, import and export of drugs); and (2) "such violation is a part of a continuing series of violations" of those subchapters, in which the person organizes, manages, or supervises five or more other participants and the person obtains substantial income. 21 U.S.C. 848(c). Thus, the CCE statute requires the jury

to find that the defendant's violation has a certain characteristic, *i.e.*, that it is "a part of a continuing series of violations." But the statute does not require unanimous agreement as to the specific identity of the other violations that make up that series. The jury's unanimous agreement that the subject violation is "a part of a continuing series of violations" is sufficient to satisfy that element of the offense.[6]

That conclusion is consistent with settled law concerning jury unanimity and sufficiency of the evidence. This Court has consistently recognized that an indictment need not specify what means, among several named, was used to commit a crime, and that a jury need not agree on a single means of commission. See *Griffin* v. *United States*, 112 S. Ct. 466, 469-470 (1991); *Schad* v. *Arizona*, 111 S. Ct. 2491, 2496-2497 (1991) (plurality opinion). As the court noted in *Schad*,

> [i]n these cases, as in litigation generally, "different jurors may be persuaded by different pieces of evidence, even when they agree on the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict."

Id. at 2497 (plurality opinion) (quoting *McKoy* v. *North Carolina*, 494 U.S. 433, 449 (1990)); accord 111 S. Ct. at

---

[6] The courts of appeals have generally concluded that a "series of violations" means three or more violations. See *United States* v. *Hall*, 843 F.2d 408, 411 (10th Cir. 1988); *United States* v. *Ordonez*, 737 F.2d 793, 806 (9th Cir. 1984). The Seventh Circuit has held that two violations, excluding conspiracy and other inchoate offenses, are sufficient. *United States* v. *Baker*, 905 F.2d 1100, 1102-1104, cert. denied, 111 S. Ct. 206, 270, 686 (1990). The jury instruction here required three violations and allowed the conspiracy charge to be counted. Hence, this case does not raise the question whether the Seventh Circuit's rule that two offenses constitute a "series" under the CCE statute is correct.

2506 (Scalia, J., concurring in part and concurring in the judgment). In the case of CCE prosecutions, it is sufficient that the jurors unanimously agree that the defendant committed a drug offense and that the offense was "a part of a continuing series of violations." The jury need not unanimously agree on which particular violations constituted that series.

Fischer argues that the court of appeals' decision conflicts with the Third Circuit's decision in *United States* v. *Echeverri*, 854 F.2d 638, 643 (1988). In *Echeverri*, the court of appeals, explicitly relying on the theory of juror unanimity that the Fifth Circuit employed in *United States* v. *Gipson*, 553 F.2d 453 (1977), held that a district court committed reversible error by failing to instruct a jury that it must unanimously agree on the constituents of the "continuing series of violations."[7] *Schad*, however, specifically disapproved of the *Gipson* analysis, stating that *Gipson*'s focus on juror unanimity did not answer the question whether the alternative findings permitted by the statute were merely different means of committing the same crime or separate and distinct offenses. 111 S. Ct. at 2498 & n.5. Accordingly, *Schad* has undermined *Echeverri*'s foundation.

Significantly, the Third Circuit held in another case predating *Schad* that a specific unanimity instruction

---

[7] The Third Circuit also cited *United States* v. *Beros*, 833 F.2d 455, 460 (3d Cir. 1987), which also relied on *Gipson*. See *Echeverri*, 854 F.2d at 642. The Third Circuit did not make entirely clear whether such an instruction is required in every CCE case or only in unusually complex CCE cases. The court emphasized that the indictment in the case before it did not specify the violations that constituted the continuing series and offered no aid in focusing the jury's attention on the predicate acts. It also noted that the district court gave a specific unanimity instruction on predicate acts pertaining to a racketeering count, which, when coupled with the absence of a specific unanimity instruction on the CCE count, might have confused the jury. 854 F.2d at 643.

was *not* required with respect to a different aspect of the CCE offense—the identities of the five or more underlings necessary to sustain a CCE charge. *United States* v. *Jackson*, 879 F.2d 85 (1989). As the Seventh Circuit has noted, the Third Circuit's rulings in *Echeverri* and *Jackson* are difficult to reconcile. *United States* v. *Canino*, 949 F.2d at 946-947. In light of this Court's decision in *Schad*, it is at least unclear that the Third Circuit would adhere to its holding in *Echeverri* if it were to face the issue again in a future case.[8] Accordingly, it cannot be concluded that there is a continuing conflict between the Seventh and Third Circuits concerning the need for a specific unanimity instruction on the predicate acts in a CCE case.

3. Petitioner Fischer contends (92-115 Pet. 46-55) that the district court erred in denying his motion for leave to depose foreign witnesses.

Federal Rule of Criminal Procedure 15(a) authorizes the taking of depositions "[w]henever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial." In light of the policy favoring live testimony at criminal trials, a district court's discretion to authorize depositions "is not broad and should be exercised carefully." *United States* v. *Mann*, 590 F.2d 361, 365 (1st Cir. 1978). See also *United*

---

[8] Nor is Fischer helped by *United States* v. *Jerome*, 942 F.2d 1328 (9th Cir. 1991), which he also cites (92-115 Pet. 44). In that CCE case, the government argued at trial that the defendant had organized 12 individuals, whom it identified by name. On appeal, the government conceded that the defendant was not the organizer of six of those individuals. In those unusual circumstances, the court of appeals held that the district court should have instructed the jury that it must agree unanimously as to the identity of each of the five people organized by the defendant. 942 F.2d at 1331. No such circumstances were present here.

States v. *Ismaili*, 828 F.2d 153, 159 (3d Cir. 1987), cert. denied, 485 U.S. 935 (1988); 2 Charles Alan Wright, *Federal Practice and Procedure (Criminal 2d)* § 242, at 13 (1982). The critical factors in determining whether a deposition should be authorized are the witness's unavailability and the materiality of the testimony that the witness would give. See *Ismaili*, 828 F.2d at 159. The decision to grant or deny a motion to take depositions should not be disturbed absent a clear abuse of discretion. See *United States* v. *Johnpoll*, 739 F.2d 702, 708 (2d Cir.), cert. denied, 469 U.S. 1075 (1984).

The district court did not abuse its discretion in refusing to authorize the depositions. At trial, several government witnesses who participated in the marijuana importation operation testified about Fischer's involvement in smuggling marijuana aboard the vessels in question. Gov't C.A. Br. 106. Because the government's case did not depend on Fischer's actual ownership of the vessels, the testimony of the foreign witnesses disputing such ownership would not have been significantly exculpatory. See *United States* v. *Bello*, 532 F.2d 422, 423 (5th Cir. 1976) ("Depositions indicating that Bello had legitimate business purposes for his trips would not contradict the substantial evidence that Bello was a participant in the two cocaine transactions at issue in this case."). Accordingly, this case does not present the "extraordinary circumstances" that would have warranted authorizing the depositions. As the court of appeals stated in *Ismaili*, 828 F.2d at 161-162, "if the testimony of witnesses in a criminal case could not negate the crux of the government's indictment * * *, the district court cannot be held to have abused its discretion in denying

authority to permit depositions of such witnesses under Rule 15(a)."[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorneys

OCTOBER 1992

---

[9] Fischer's reliance on *United States* v. *Sindona*, 636 F.2d 792 (2d Cir. 1980), cert. denied, 451 U.S. 912 (1981), is unavailing. In that case, the court of appeals allowed the government to depose foreign witnesses over defense objection that the witnesses were not unavailable. The defendant did not dispute the importance of the testimony of the foreign witnesses, as we do here.